No. 16-1454

IN THE

Supreme Court of the United States

STATE OF OHIO, *et al.*,

Petitioners,

—v.—

AMERICAN EXPRESS COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* ANTITRUST LAW & ECONOMICS SCHOLARS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are fifteen scholars of antitrust, law, and economics at leading universities and research institutions across the United States. Their names, titles, and academic affiliations are listed in Appendix A. They have an interest in the proper development of antitrust jurisprudence and believe the Court has a valuable opportunity here to clarify the rule of reason's application in cases under Sherman Act Section 1, 15 U.S.C. § 1, by affirming the Second Circuit's holding that analysis of both sides of the two-sided market and a demonstration of market power are required to establish harm to competition in vertical restraints cases where the defendant is a two-sided platform. *Amici* are concerned that reversing the Second Circuit and adopting the Government's approach to rule of reason analysis would undermine the goals of the antitrust laws. Specifically, it would institutionalize a nebulous legal framework, untethered from sound economics, depriving defendants of valuable clarity as to what evidence a court might consider

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person other than the *amici* and their counsel made a financial contribution for the preparation or submission of this brief. All parties have filed blanket consents to the filing of amicus briefs.

persuasive or sufficient in any given case. And it would harm consumers by leading lower courts to erroneous decisions that condemn procompetitive conduct, thereby frustrating basic antitrust objectives.

SUMMARY OF ARGUMENT

While the three-step burden-shifting framework for evaluating antitrust cases under the rule of reason is conceptually well-accepted and understood, case law remains unclear regarding what suffices to satisfy each party's burden at each of the three stages. This case offers the Court an opportunity both to clarify what constitutes harm to competition and to explain the nature of the shifting burdens in rule of reason analysis.

In their merits briefing, rather than offer tools for providing structure to the rule of reason, Petitioners urge the Court to adopt an amorphous standard that would permit plaintiffs to satisfy their burden without evidence of durable market power—and even without direct proof of anticompetitive effects as the term is traditionally and properly understood in Section 1 jurisprudence. Acquiescing to Petitioners' vague conception of a plaintiff's *prima facie* burden would untether antitrust law from rigorous economic analysis and harm consumers by increasing significantly the risk of error in lower courts. This would leave litigants with little to no

certainty regarding what evidence they should introduce, let alone what evidence a court would find persuasive in any given case, and no clarity as to what businesses can and cannot do.

Without an approach to establishing plaintiff's burden disciplined by economic analysis and proof, the balance of false positive (Type I) and false negative (Type II) errors—which is critical to proper adjudication of the antitrust laws—would be thrown off keel. The fundamental goal of antitrust law is to foster consumer welfare by enhancing or increasing output in a relevant market. Output is the touchstone of antitrust analysis because a dominant firm's ability to constrain market-wide output is what allows it to anticompetitively raise prices and harm consumers. Petitioners' approach, however, would flip this analysis on its head and allow price effects to dictate results, thereby permitting courts to *ignore* output effects—the *sine qua non* of antitrust analysis—in ascertaining whether a plaintiff satisfied its *prima facie* burden.

Such a result is contrary to this Court's precedent and particularly problematic here. This Court has recognized that vertical restraints might "[increase prices] in the course of promoting procompetitive effects." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 895-96 (2007) (citing *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485

U.S. 717, 728 (1988)). And modern economics provides no basis for assuming that a demonstration of price effects on only one side of a two-sided market accurately represents the market-wide effects of a course of conduct. Rather, economics predicts that market-wide welfare might increase, decrease, or remain neutral given price effects on a single side. Only an analysis of the market as a whole can illuminate the true competitive implications.

This brief explains *amici*'s understanding of the relevant economic analysis. It explains why basic economic principles underlying the analysis of multi-sided markets lead to the conclusion that a plaintiff should be required to demonstrate, at a minimum, that: (1) the allegedly unlawful restraint caused anticompetitive effects in the form of actual or probable restricted *output* market-wide—a showing that logically requires analyzing both sides of a two-sided market; and (2) the defendant had sufficient market power to restrict output in a properly defined market. These two requirements align with sound economics and would also provide clear guidance for courts in applying the rule of reason.

ARGUMENT

I. ECONOMIC ANALYSIS OF TWO-SIDED PLATFORMS DEMONSTRATES THAT ANALYZING MARKET-WIDE OUTPUT IS CRITICAL TO UNDERSTANDING THE COMPETITIVE EFFECTS OF PLATFORM BEHAVIOR

"Output" refers to the amount of a good or service produced, and has long been a critical component of antitrust analysis.[2] *See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 103 (1984). As Judge Easterbrook has explained, the antitrust "inquiry in each case is the ability to control output and prices, an ability that depends largely on the ability of other firms to increase their own output in response to a contraction by the defendants." *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986). In two-sided markets, ascertaining a rival's ability to respond to a defendant's reduction in its own output requires analyzing output effects on both of the market's sides.

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[2] *Amici* note that output may be difficult to measure where quality is an important component. Transaction volume is a particularly accurate measure of output here because it accurately reflects activity market-wide.

A. Output in Two-Sided Markets is Affected by the *Distribution* of Prices between the Sides, Not Just by Overall Price Levels

A platform operating in a two-sided market serves two or more distinct sets of customers who, in some way, rely upon each other—and accordingly upon the platform—to realize the particular value the platform provides. David S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, 1 ISSUES IN COMPETITION LAW AND POLICY 667, 669 (2008). There is an interdependency of demand between the two customer groups that the platform seeks to satisfy by bringing them together and by setting prices (and other attributes) that encourage both sides to participate in a way that maximizes platform-wide output. Rochet and Tirole—leaders in the development of the economics of two-sided platforms—offer this definition:

> We define a two-sided market[3] as one in which the volume of transactions between end-users depends on the

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[3] In discussing two-sided platforms, economists typically use the term "market" in a broader sense than how courts use the term for antitrust purposes. *See* Evans & Schmalensee, *Markets with Two-Sided Platforms*, *supra*, at 669 n.5.

> structure and not only on the overall level of the fees charged by the platform. A platform's usage or variable charges impact the two sides' willingness to trade once on the platform and, thereby, their net surpluses from potential interactions; the platforms' membership or fixed charges in turn condition the end-users' presence on the platform.

Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645, 646 (2006). In other words, in two-sided markets, output is affected not just by the overall price platform-wide, but also by the *distribution* of prices across the two sides. *See also* Benjamin Klein, *et al.*, *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 ANTITRUST L.J. 571, 598 (2006) ("The economic theory of two-sided markets indicates that relative prices on the two sides of the market are independent of the degree of competition faced by a supplier in such a market. While total prices will be influenced by competition, relative prices are determined by optimal balancing of demand on the two sides of the market.").

Two-sided markets are ubiquitous in the modern economy—examples range from newspapers to Internet search engines to sharing economy apps.

Joshua D. Wright & John Yun, *Stop Chug-a-lug-a-lugin 5 Miles an Hour on Your International Harvester: How Modern Economics Brings the FTC's Unfairness Analysis Up to Speed with Digital Platforms*, 83 GEO. WASH. L. REV. 2130, 2135-36 (2015). A classic example of a two-sided market is the market for credit cards: store owners do not want to invest in technology and contracts for credit cards consumers do not hold or use, while cardholders do not want credit card stores to refuse acceptance. *See, e.g.*, David S. Evans & Richard Schmalensee, *More than Money*, PAYING WITH PLASTIC - THE DIGITAL REVOLUTION IN BUYING AND BORROWING (2d ed. 2005); Evans & Schmalensee, *Markets with Two-Sided Platforms*, *supra*, at 667; Klein, *et al.*, *supra*, at 580-88. [4] Critically, consumers and merchants need payment methods that they both accept because that is the only way they can do business with one another. Merchants and cardholders are unable to solve this problem themselves, due to prohibitive transactions costs—bilateral contracts are simply not

[4] The work of William F. Baxter—to whom the original insights regarding the existence and economics of two-sided markets are usually attributed—was based upon his study of four-party payment systems and the general-purpose credit card systems. William F. Baxter, *Bank Interchange of Transactional Paper: Legal and Economic Perspectives*, 26 J.L. & ECON. 541 (1983).

an option—and externalities[5] that neither side can internalize, but that a platform, like Amex, can. *See* David S. Evans, *Some Empirical Aspects of Multi-Sided Platform Industries*, 2 REVIEW OF NETWORK ECONOMICS 191 (2003), *reprinted in* David S. Evans, PLATFORM ECONOMICS: ESSAYS ON MULTI-SIDED BUSINESSES 1, 30 (2011).

B. Analysis of Market-wide Output Effects is Required

The fundamental economic insight is that, in two-sided markets, overall competitive effects cannot be inferred from conduct or effects on one side of the market alone. What happens on one side of the market necessarily affects the other side, and so the platform faces tradeoffs in attempting to balance the competing interests of the two sides. *See, e.g.*, Klein, *et al.*, *supra*, at 577-88; Evans & Schmalensee, *Markets with Two-Sided Platforms*, *supra*, at 674-78. Numerous activities impact the distribution of costs and benefits across different sides of the market—but do not necessarily affect overall output.

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[5] "Externalities" arise when a party to a transaction does not internalize its full costs or benefits. *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

A common example in the economics literature is newspapers and their two distinct customer groups: advertisers and readers. Advertisers benefit when readers see their ads; readers benefit when advertisers pay for ads, which subsidizes the readers' cost of accessing the newspaper. But if there are too many ads, readers will value the newspaper less and be willing to pay less for it—i.e., fewer readers will purchase the paper. In turn, advertisers will reach fewer readers and value newspaper ad space less. The newspaper, then, must decide how to maximize output by balancing the interests of advertisers and readers. The demand sensitivities (that is, responsiveness to changes in price) of each side of the market will largely determine the alignment that maximizes output. Klein, *et al.*, *supra*, at 577-88.

It is common for two-sided platforms to compete for consumers by offering low-cost—even free—products or services to end consumers to entice them onto the platform, resulting in significant consumer benefits subsidized by firms (like advertisers). David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 COLUM. BUS. L. REV. 667, 668, 682, 688 (2005) ("Empirical surveys of industries based on [two-sided platforms] find many examples of prices that are low, or even negative, so that customers on one side are incentivized to participate in the platform."); Evans & Schmalensee, *Markets*

with Two-Sided Platforms, *supra*, at 667; David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, 1 THE OXFORD HANDBOOK OF INT'L ANTITRUST ECON. 404-47 (2015). This result is expected, as end consumers are typically the more price sensitive side of the market. This is particularly true when individuals are on one side and companies, like advertisers or merchants, are on the other side. *See* Klein, *et al.*, *supra*, at 577-88; *see also* Erik Brynjolfsson & Joo Hee Oh, *The Attention Economy: Measuring the Value of Free Digital Services on the Internet*, THIRTY THIRD INT'L CONF. ON INFO. SYS. (2012) (estimating free internet services yielded a $100 billion per year increase in consumer welfare in the U.S.).

These same basic economic forces describe the credit card market. The credit card system is only useful if both cardholders and merchants participate. Cardholders will obtain cards only if merchants are known to accept them; merchants will arrange to accept only those cards that consumers are known to possess (and use). The relative sensitivity of the two sides to price changes will largely dictate the distribution of pricing between cardholders and merchants and, because cardholders are typically more price sensitive, merchants will tend to bear a larger fraction of the costs. Klein, *et al.*, *supra*, at 585-99. Thus, credit card companies will typically make changes to apportion more benefits toward

credit card holders and more costs to merchants, to maximize overall output in this two-sided market. *See id.* at 598 ("[C]hanges in Visa's and MasterCard's interchange fees over time reflect changes in competitive balancing of the two sides of the payment card market, and not changes in the market power of the Visa and MasterCard associations."). Such moves to realign the platform's costs and benefits are therefore consistent with procompetitive efforts to increase output.

Accordingly, it is *necessary* to consider what is happening on both sides of a two-sided platform to understand properly the implications of the platform's conduct. One side of the market may experience some burden from a rule or practice, but a significant benefit on the other may more than offset this burden; conversely, one side might experience modest benefits while the other is significantly hurt. There is nothing in the economics literature to support a presumption that one of these scenarios is more likely than the other. In other words, the economics literature does not support the proposition that demonstrating harm on one side of a two-sided platform is sufficient to establish any presumption that *market-wide* consumer welfare decreased. To the contrary, there is significant literature discussing how and why altering the allocation of benefits between the two sides can result in overall increases to consumer welfare, by better aligning the tradeoffs

to maximize results (the goal of the platform as a rational, profit-maximizing actor). *See, e.g.*, Klein, *et al.*, *supra*, at 577-88; Evans & Schmalensee, *Markets with Two-Sided Platforms*, *supra*, at 674-78; Evans & Noel, *supra*, at 680-84. The simple reallocation of costs and benefits across the two sides of a two-sided market can be output increasing, output reducing, or output neutral. Looking to effects on one side simply cannot distinguish between these scenarios.

As such, a rule that presumes that harm to one side of a two-sided market is sufficient to demonstrate harm to consumer welfare (and to shift the plaintiff's burden) is likely to lead to serious errors that are costly to competition and consumers. Consider a scenario in which a two-sided platform competes vigorously with other two-sided platforms. In this situation, competing platforms may charge high prices to one side of the platform, e.g., the advertisers, but prices well below marginal cost to the other side, e.g., the end users. Analyzing one side of the platform would then lead to the bizarre conclusion that the platforms are engaging in both supra-competitive (advertiser side) and predatory (user side) pricing. In fact, however, the vigorous competition with other platforms actually prevents the platform from harming the market *as a whole*. Brief of Dr. David S. Evans & Prof. Richard Schmalensee as Amici Curiae in Support of Appellants-Cross Appellees at 18-19, *US Airways,*

Inc. v. Sabre Holdings Corp., No. 17-960 (2d Cir. filed July 26, 2017). Moreover, these simultaneous pricing practices often *expand* market output, thereby enhancing consumer welfare – as in the very market at issue here. Thus, it is clear that evidence of pricing effects on one side or another is equivocal—such effects provide no real insight into the competitive landscape.

Market output should be the focus of the analysis. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 31-33 (1984); ROBERT H. BORK, THE ANTITRUST PARADOX (1978); Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, THE ANTITRUST SOURCE (Aug. 2015). The ability to restrict output is what allows a monopolist ultimately to increase prices. *See, e.g.*, IIB PHILIP E. AREEDA, ET AL., ANTITRUST LAW, AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 501 (4th ed. 2017) ("Market power is the ability to raise price profitably by restricting output."). Unlike prices—which, as discussed above, might appear simultaneously as predatory on one side of the market and supra-competitive on the other—output tells us what is happening in the market *as a whole*. If market-wide output has decreased, that is evidence of a potential anticompetitive effect; if output has remained steady or increased, however, that is evidence of a healthy, competitive market. *See, e.g.*, Thomas A. Lambert, *A*

Decision-Theoretic Rule of Reason for Minimum Resale Price Maintenance, 55 ANTITRUST BULLETIN 167 (2010) (explaining why output is the proper metric for antitrust analysis).

While price effects can be illuminating in antitrust analysis, they are only associated with the exercise of market power when they are accompanied by a reduction in output. That is, a monopolist typically increases prices by restricting output. *See, e.g.*, IIB PHILIP E. AREEDA, ET AL., *supra*, ¶ 501; *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) ("Prices increase marketwide in response to the reduced output because consumers bid more in competing against one another to obtain the smaller quantity available."); *Ball Mem'l Hosp.*, 784 F.2d at 1335 ("Market power comes from the ability to cut back the market's total output and so raise price[.]"). Accordingly, antitrust analysis typically focuses upon output, utilizing pricing evidence where the price-increasing conduct is well-understood to correspond with decreased output, but recognizing that this utility may be limited in certain cases. *See Bus. Elecs. Corp.*, 485 U.S. at 723 (describing "manifestly anticompetitive" conduct as "conduct 'that would always or almost always tend to restrict competition and decrease output[.]'" (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985))); *see also* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW

DEVELOPMENTS 227 (8th ed. 2017) ("[D]irect evidence of supracompetitive pricing must be accompanied by evidence of restricted output[.]").

Accordingly, when a case involves a two-sided market, an antitrust plaintiff's *prima facie* burden must include a demonstration of a market-wide reduction in output.[6]

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[6] Note that not every case involving two-sided platforms will necessarily involve a two-sided *antitrust-relevant* market. For example, in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), the issue was the elimination of competition for the card-issuing business of banks. Although the elimination of that competition ultimately affected merchants and cardholders, the focus was appropriately limited to effect on the banks because the merchant and cardholder effects could not mitigate or exacerbate the bank effect. This fact distinguishes *Visa* because here, Amex is competitively constrained in altering prices and conduct towards merchants by effects on both the merchant and the cardholder sides of the market. *See* App'x at 34a-36a.

II. AS THE SECOND CIRCUIT PROPERLY HELD, ANTITRUST LAW DOES—AND SHOULD CONTINUE TO—REQUIRE A PLAINTIFF TO DEMONSTRATE HARM TO COMPETITION MARKET-WIDE

A. Plaintiff's Burden Is, and Should Remain, to Prove Harm to the Market as a Whole

Antitrust law's rule of reason burden-shifting framework is by now well-established. *See United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (en banc). The plaintiffs bear the burden, in the first instance, to demonstrate harm to competition. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). The burden of production (not proof) then shifts to defendants, who can rebut this demonstration, for instance, by showing why plaintiffs' *prima facie* case fails to paint an accurate picture or by proffering evidence of procompetitive effects. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999); *see also FTC v. Actavis, Inc.*, 570 U.S. 136, 133 S. Ct. 2223, 2236 (2013); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 483 (1992); *United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974) (rejecting effort to enjoin a merger of firms with historically high shares because those shares did not accurately reflect their competitive position going forward). If defendants offer such evidence, the burden of production moves back to the plaintiff

and merges with the burden of persuasion, which always remains with the plaintiffs in rule of reason cases.[7] But how does a plaintiff satisfy these burdens?

Antitrust analysis, screens, and presumptions are properly tethered to economic understanding and insights. *See Leegin*, 551 U.S. at 887, 889-92 (refusing to apply a *per se* rule of illegality when doing so "would undermine, if not overrule, the traditional 'demanding standards' for" *per se* rules, because no economic basis for this rule existed (quoting *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977))); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (recognizing "[m]istaken inferences and the resulting false condemnations" may be "'especially costly'" (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986))); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 458 (1993) ("[T]his Court and other courts have

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[7] While the *NCAA* Court stated that the petitioner faced a "heavy burden of establishing [its] affirmative defense," this statement arose in a context in which the conduct explicitly raised prices and reduced output. *NCAA*, 468 U.S. at 113-14; *cf. Cal. Dental*, 526 U.S. at 771. In a standard rule of reason case, as here, the burden of proof remains with the plaintiff. *See United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990).

been careful to avoid constructions of § 2 which might chill competition, rather than foster it."); Easterbrook, *The Limits of Antitrust*, *supra*, at 10-11; Bork, *The Antitrust Paradox*, *supra*, at 133. Relevant to the case at hand, no economic basis exists for establishing a presumption that "harm" on one side of a two-sided platform is sufficient to demonstrate that market output has been restricted, or that consumer welfare has otherwise been harmed. This is particularly true when the alleged harm is price effects that, as discussed above, may be positive or negative on one side of the market—and may be opposite on the other side—all without altering market-wide welfare or effects.

An antitrust plaintiff's burden is to demonstrate harm to competition, which is defined as harm to the competitive process or to consumers. *Spectrum Sports*, 506 U.S. at 458; *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). The Government, however, would have the Court lessen the plaintiff's burden by allowing it to be satisfied by evidence of price effects limited to an artificially isolated and misleading component of the relevant market. This argument commits two fundamental errors.

First, it erroneously ignores output effects and presumes price effects are conclusive of, or at least tend to provide good evidence regarding, harm to consumers. As noted, price effects are relevant to the

extent they are consistent with a reduction in market output or an increase in quality-adjusted market-wide cost to consumers. However, this Court has rejected the proposition that price effects are sufficient to discharge a plaintiff's burden in contexts where these effects are not informative of an output reduction—for instance, when a price increase is implemented to reflect a quality increase. *See, e.g., Leegin*, 551 U.S. at 895, 889-92; *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993) ("Where, as here, output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand."); Lambert, *supra*.[8] The *Leegin* Court explicitly held that the respondent was "mistaken in relying on pricing effects absent a further showing of anticompetitive conduct," recognizing "prices can be increased in the course of promoting procompetitive effects." 551 U.S. at 895-96 (citing *Bus. Elecs. Corp.*, 485 U.S. at 728).

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[8] *See also* Transcript of Oral Argument at 15, *Leegin*, *supra* (Scalia, J.: "So the mere fact that it would increase prices doesn't prove anything. . . . If, in fact, it's giving the consumer a choice of more service at a somewhat higher price, that would enhance consumer welfare, so long as there are competitive products at a lower price[.]").

In other words, when both prices and output increase, courts do not condemn the conduct because these simultaneous results do not indicate that competition has been restricted or consumer welfare harmed. *See Brooke Grp.*, 509 U.S. at 237; App'x at 29a. Since market-wide output in two-sided markets is dependent upon the *distribution* of prices between the two sides, and not just upon the overall prices set for each side, price effects here are particularly uninstructive. *See* Rochet & Tirole, *supra*, at 646; Klein, *et al.*, *supra*, at 599.

Second, Petitioners' argument inappropriately divorces inherently intertwined aspects of the market. Plaintiffs cannot lessen their burden by artificially cordoning off segments of the market, and then purporting to show harm only in that artificially segregated piece. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31 (1984) (remanding the case because there was "no showing that the ***market as a whole*** ha[d] been affected at all by the contract" (emphasis added)), *abrogated in part on other grounds by Ill. Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006); *see also* App'x at 49a-50a ("Here, the market *as a whole* includes both cardholders and merchants, who comprise distinct yet equally important and interdependent sets of consumers sitting on either side of the payment-card platform.").

Indeed, the Court has rejected such requests to deviate from market-wide impact as the lodestar of competitive effects, either through market definition tricks or by redefining the appropriate locus of harm to something else—like solely intrabrand competition—that, in isolation, offers a misleading understanding of market effects. The *Leegin* Court, for instance, refused to accept the plaintiff's argument that higher prices and harm to intrabrand competition divorced from an analysis of market-wide effects was sufficient to demonstrate harm to competition. 551 U.S. at 889-92. Rather, the Court recognized that analyzing intrabrand competition effects, alone, yielded erroneous conclusions regarding overall competitive effects. *Id.* This is because looking only at intrabrand competition analyzes the wrong price and output effects. Specifically, it fails to examine market-wide effects. *See also Jefferson Parish*, 466 U.S. at 32; *Monsanto*, 465 U.S. at 762 ("In *Sylvania* we emphasized that the legality of arguably anticompetitive conduct should be judged primarily by its '***market impact***'" (emphasis added) (quoting *Sylvania*, 433 U.S. at 51)).

Other cases are not to the contrary. For example, in *United States v. Philadelphia National Bank*, the Court rejected the notion that efficiencies in a different geographic (single-sided) market could be used by the defendant to shift the burden back to plaintiffs. 374 U.S. 321 (1963). This is a very

different factual setting than the one involved here, where the geographic market is the same and the interdependency of demand between cardholders and merchants is well recognized.

Moreover, a rule permitting Petitioners' artificial distinction and examining only one side of a two-sided market would unnecessarily and inappropriately increase the costs of antitrust intervention. *See Trinko*, 540 U.S. at 414; *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 283-84 (2007). Primarily, it would significantly increase the prevalence of false positive (Type I) errors, and thereby chill the very procompetitive conduct antitrust law seeks to foster. Petitioners' rule presumes that a demonstration of effects on one side of a two-sided market sufficiently represents market-wide effects. But modern economics provides no basis for such a presumption. To the contrary, economic analysis demonstrates that consumer welfare might increase, decrease, or remain steady when prices change on one side of a two-sided platform. Accordingly, analyzing just one side of a two-sided market is likely to mislead courts erroneously to condemn procompetitive conduct. It may also lead enforcers to wrongly allow anticompetitive conduct to persist; for instance, an enforcer might analyze effects on one side of the market, observe they were positive, and decide not to

investigate further—despite harms arising on the other side and market-wide.

Allowing a plaintiff to discharge its initial burden by demonstrating harm on only one side of a two-sided market runs afoul of both basic legal principles and sound economics. This is particularly true when both prices and output have increased. Accordingly, antitrust law should—and does—reject an approach that would allow plaintiffs to satisfy their burden by drawing artificial distinctions within an antitrust-relevant market and citing to only price effects within that artificial segment.

B. The Second Circuit Correctly Found Petitioners Failed to Satisfy Their Burden

This case demonstrates the dangers of condemning conduct in a two-sided market based upon an analysis of only one side of the market. App'x at 31a-40a. As the Second Circuit correctly noted, "[s]eparating the two markets allows legitimate competitive activities in the market for general purposes to be penalized no matter how output-expanding such activities may be." *Id.* at 34a-35a. Such condemnation would chill firms from engaging in output-expanding, i.e., procompetitive, conduct, a result that undermines the very goals of the antitrust laws. *See Brooke Grp.*, 509 U.S. at 237; *see also NCAA*, 468 U.S. at 103 ("*Broadcast Music*

squarely holds that [certain] arrangement[s] may be so efficient that [they] will increase sellers' aggregate output and thus be procompetitive." (citing *BMI v. CBS*, 441 U.S. 1, 18-23 (1979))).

Here, there was no evidence of diminished output. Quite to the contrary, as the Second Circuit found, "the evidence presented at trial suggested that industry-wide transaction volume has substantially *increased* and card services have significantly *improved* in quality." App'x at 52a. Total transaction dollar volume is an appropriate measure of output here because it speaks to the level of market-wide output, both on the cardholder and merchant sides. Notably, Petitioners acknowledge as much by selecting this metric as the basis for calculating market shares.

Petitioners even conceded at oral argument before the Second Circuit that "credit-card networks are offering more and better cardholder benefits than ever before, including enhanced fraud-protection services, airline miles, and cash-back rewards." *Id.* In other words, both quality and output improved market-wide and thus, even if prices also increased on the merchant side, such "rising prices [we]re equally consistent with growing product demand." *Brooke Grp.*, 509 U.S. at 237. This is particularly true here, given that output in two-sided markets is affected not only by the overall price level charged

(on one or both sides), but also by the distribution of prices between the two sides. *See* Rochet & Tirole, *supra*, at 646; Klein, *et al.*, *supra*, at 599. Here, it is reasonable to expect any increased costs would be distributed (disproportionately) to the less demand-sensitive side, meaning increased merchant prices are a predicted result in a competitive, expanding market.

Moreover, the non-discrimination provisions (NDPs) were strengthened at a time when Amex was struggling, largely due to successful Visa campaigns like "We Prefer Visa." App'x at 19a. The restraints were apparently intended to—and evidence of increased market-wide output suggests they did—help Amex compete in an aggressively competitive environment. These restraints did not prevent credit card companies from competing for merchants; that is, they did not preclude merchants from accepting any and all other cards. For instance, the record reflects that Discover was accepted at about 3 million *more* merchant locations nationwide than Amex. *See* App'x at 13a, 85a, 151a. So Discover, the smallest competitor in the relevant market, was plainly not excluded from merchant locations by Amex's NDPs. That cardholders opted to use Discover less frequently despite its wider acceptance speaks volumes about the importance of acknowledging the competition and consumer benefits on the cardholder side.

The NDPs also prevent free-riding, thereby fostering the realization of consumer benefits. As Amex and the Second Circuit correctly note, merchants have strong incentives to use Amex's brand name to entice high-spend customers to its locations and then—once assured of the sale by Amex's name—to convince them to substitute away from Amex for the actual purchase. App'x at 50a. This behavior is a quintessential example of free-riding, the elimination of which can increase competition and enhance consumer welfare, as this Court has repeatedly recognized. *See, e.g.*, *Leegin*, 551 U.S. at 890-92; *Sylvania*, 433 U.S. at 54-56. The Second Circuit correctly explained that the NDPs aligned merchants' incentives with Amex's, thereby allowing merchants to use Amex's brand name to attract more customers, and allowing Amex to benefit from this use—and, in turn, to offer additional consumer benefits. That is, the NDPs helped achieve benefits across the two-sided platform. App'x at 50a-51a & n.54 (citing Klein, *et al.*, *supra*, at 580).

In fact, contrary to arguments certain *amici curiae* proffer, credit cards offer benefits that extend beyond those individual cardholders receive for using a given card for a given transaction. *See* Brief for United States Public Interest Research Group Education Fund, Inc., *et al.* at 9-11, 13-14, *State of Ohio, et al. v. American Express Co., et al.*, No. 16-

1454 (Dec. 14, 2017). Their erroneous arguments rest upon the "unrealistic assumption," unsupported by sound empirical data, that consumers would make precisely the same purchases regardless of whether they used (or even owned) credit cards and, accordingly, that the cost to merchants of accepting credit cards simply increases the costs of goods and services. *See* Steven Semeraro, *Assessing the Costs & Benefits of Credit Card Rewards: A Response to Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, 25 LOY. CONSUMER L. REV. 30, 47-59 (2012). In other words, this argument assumes that credit cards are just a tax on merchants, without economic benefit, that is ultimately passed on to consumers.

But merchants accept credit cards precisely because they benefit from doing so. Consider the costs of other forms of payment like checks—which may be returned unpaid—and cash—which both increases labor costs (e.g., requiring proper counting and accounting for cash in the register) and poses a much higher risk of theft. Semeraro, *supra*, at 47-49; Timothy J. Muris, *Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets*, 2005 COLUM. BUS. L. REV. 515, 538 (2005). These costs may very well equal or exceed the cost of accepting credit cards. Semeraro, *supra*, at 47-49; Margaret E. Guerin-Calvert & Janusz A. Ordover, *Merchant Benefits and Public Policy towards*

Interchange: An Economic Assessment, 4 REVIEW OF NETWORK ECONOMICS 1, 18-19 (2005) ("Review of the empirical evidence shows . . . the costs of providing these [check guarantee] services are roughly comparable—if not somewhat higher—than those for credit card 'payment guarantee' services."). Indeed, if credit cards only increased merchants' costs and offered no offsetting benefits—as *amici*'s argument contends—merchants would accept no credit cards at all.

Among the merchant benefits are that credit cards facilitate additional consumer purchases—with credit cards, consumers are not constrained by the amount of cash in their wallets at a given moment, or by whether they are carrying their checkbooks. Of course, different consumers may benefit to different degrees at different times. But this is quite common. Consider a merchant that offers free parking. Offering this service increases the merchant's costs (as does offering credit cards), and not every customer will avail themselves of the benefits every time (as with credit cards). That not every customer will utilize free parking on every visit would not, however, negate the many benefits of the free parking lot—just as with credit cards. In fact, consumers who do not currently own credit cards could likely obtain one and reap the benefits of the card far more easily than consumers who do not own

cars could obtain a car (plus required insurance, gas, etc.) and benefit from the free parking.

Accordingly, the evidence is consistent with procompetitive market conditions and fails to support a presumption of anticompetitive harm, as the Second Circuit correctly held.

III. MARKET POWER IS A CRITICAL SCREEN IN VERTICAL CASES

Proof of a defendant's market power is a long-standing requirement in antitrust analysis. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The term refers to a firm's ability to control prices by restricting market output, and is essential to both economic and legal theories of anticompetitive harm. *Id.*; *Jefferson Parish*, 466 U.S. at 27 & n.46.

A. The Restraints at Issue in This Case are Classic Vertical Restraints

The Second Circuit, District Court, and the parties all agree the restraints at issue here are "vertical" for antitrust purposes; that is, they primarily restrain behavior between companies at different points in the production chain. App'x at 29a-30a. The NDPs, for instance, prevent merchants—who operate at a different level than credit card companies—from attempting to convince

cardholders to switch to other card options at the point of purchase.

The Second Circuit rightly rejected the Government's attempt—renewed in this appeal—to characterize the vertical restraints at issue as somehow different from other vertical restraints, owing to their implications for horizontal competition. App'x at 30a & n.42; Brief for the Petitioners and Respondents Nebraska, Tennessee, and Texas, at 16, *State of Ohio, et al. v. American Express Co., et al.*, No. 16-1454 (Dec. 7, 2017). The Second Circuit correctly explained that it has "never drawn this type of distinction between any varieties of vertical restraints[.]" 29a-30a & n.42. This is with good reason. Vertical restraints that affect horizontal interbrand competition are simply not the novelty Government attempts to paint them to be. Rather, many—indeed, most—vertical restraints affect horizontal competition. Plaintiffs invariably allege competition was harmed because the vertical restraint somehow prevented horizontal rivals from effectively competing—precisely what Petitioners argue differentiates their argument here.

Traditional vertical restraint theories fully cover these concerns, as well as their procompetitive justifications. It is, for instance, well-recognized that vertical restraints can enhance a form of horizontal competition commonly referred to as competition for

the contract. As Judge Easterbrook has explained, "Competition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe, and it is common." *Paddock Publ'ns, Inc. v. Chi. Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996). This kind of competition often derives from, or is fostered by, vertical restraints like exclusive and slotting contracts. For example, an exclusive arrangement may require a retailer to purchase only from a single supplier. While a vertical restraint, this arrangement has an obvious horizontal component. *See* Benjamin Klein & Kevin M. Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 ANTITRUST L.J. 433 (2008).

Similarly, slotting agreements typically require complying merchants to favor certain brands over others, by, e.g., providing superior placement / advertising. That the merchant commits to favoring one brand over another in dealing with end consumers—as opposed to merely appearing neutral between them, as is the case here—does not necessarily mean that other brands are now competing less vigorously for that placement, or that horizontal competition has otherwise diminished. *See, e.g.*, Joshua D. Wright & Benjamin Klein, *The Economics of Slotting Contracts*, 50 J.L. & ECON. 421 (2007); Joshua D. Wright, *Slotting Contracts and Consumer Welfare*, 74 ANTITRUST L.J. 439 (2007). And such arrangements certainly seem, on their face,

to have potential horizontal competition implications at least as significant as those here.

Likewise, this Court has long recognized that vertical restraints can and do implicate horizontal, or interbrand, competition.[9] *See, e.g.*, *Leegin*, 551 U.S. at 889-92 ("Absent vertical price restraints, the retail services that enhance [horizontal] interbrand competition might be underprovided."); *Bus. Elecs. Corp.*, 485 U.S. at 728-31 & n.4 ("The dissent apparently believes that whether a restraint is horizontal depends upon whether its anticompetitive *effects* are horizontal, and not upon whether it is the product of a horizontal agreement. . . . but if [that] were the language of antitrust analysis there would be no such thing as an unlawful vertical restraint, since all anticompetitive effects are by definition horizontal effects."); *Sylvania*, 433 U.S. at 52-56. Accordingly, the Second Circuit correctly rejected the Government's distinction as one "without meaningful difference to the antitrust analysis in this case." Appx' at 29a-30a & n.42.

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[9] Moreover, even if horizontal competition is affected, there remains no economic basis to analyze the effects on one side of a two-sided platform to the exclusion of the effects across both sides of the platform.

B. The Basic Economics of Vertical Restraints Require Market Power for Anticompetitive Harm to Arise

Economic literature demonstrates that vertical restraints offer tremendous consumer benefits, and only on rare occasion yield anticompetitive results. *See* James C. Cooper, et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 641 (2005) ("The theory shows that vertical practices potentially can harm competition. This finding is fragile, however, as anticompetitive equilibria emerge only under specific—and difficult to verify assumptions. . . . Seemingly minor perturbations to these assumptions can reverse the predicted welfare effects of the practice in question."); Oliver E. Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV. 953 (1979). Vertical restraints can, for instance, diminish double marginalization, mitigate free riding on manufacturer-supplied investments, and align manufacturer with distributor incentives. *See* Wright & Klein, *supra*; Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty*, 74 ANTITRUST L.J. 473 (2007); Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31

J.L. & ECON. 265 (1988); Howard P. Marvel, *Exclusive Dealing*, 25 J.L. & ECON. 1 (1982).

All modern theories of how vertical restraints can potentially harm competition—and examples of when they actually do so—rely upon defendant's market power. The prevailing Section 1 paradigm is that of foreclosure or "raising rivals' costs" (RRC). *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price*, 96 YALE L.J. 209, 214 (1986); Steven C. Salop & David T. Scheffman, *Cost-Raising Strategies*, 36 J. INDUS. ECON. 19, 19–20 (1987); Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983). Under these theories, a dominant firm can effectively prevent, or foreclose, rivals from reaching consumers or from accessing critical inputs at competitive rates. The firm's ability to foreclose rivals is, in turn, a result of its market power; absent market power, the firm could not prevent rivals from circumventing it and directly doing business with consumers or suppliers. *See* Easterbrook, *The Limits of Antitrust*, *supra*, at 13-15. Thus, the fundamental ability of a firm to foreclose rivals is derivative of its market power. *See* Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 ANTITRUST L.J. 693, 696 (2000) ("[T]he anticompetitive—that is, exclusionary—conduct must be linked to the monopoly.").

The market power demonstration is, furthermore, critical to properly managing the risk of errors in vertical restraint cases. *See* Easterbrook, *The Limits of Antitrust*, *supra*, at 13-15. Because firms lacking market power will be unable to foreclose rivals, this requirement both (1) helps courts and enforcers to avoid false positives (without substantially increasing the risks of false negatives); and (2) reduces administrative costs of an antitrust regime, including investigative and lawsuit costs that can be short-circuited when the defendant lacks the requisite market power. Again, the difficulty of distinguishing pro- versus anticompetitive effects, as well as the asymmetrically high costs of false positives—which may forever chill conduct that benefits consumers—make clear that courts should proceed with caution before condemning potentially procompetitive behavior. *Id.*; *Spectrum Sports*, 506 U.S. at 458-59. The market power requirement provides an economically-grounded and principled screen to assist courts in this endeavor.

Moreover, the market power requirement is well-justified by the empirical evidence. *See* Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, HANDBOOK OF ANTITRUST ECONOMICS 391, 408 (2008) ("The current rule-of-reason approach, combined with 'safe harbors' for manufacturers with low market shares, seem more

than justified based on this evidence."). Indeed, empirical analyses have clearly and consistently found that, in practice, vertical restraints tend to enhance consumer welfare and only rarely result in negative welfare effects. *See* Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems,* THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72-73, 76 (2008) (reviewing the empirical literature and concluding, "[w]ith few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons. This literature supports a fairly strong prior belief that these practices are unlikely to be anti-competitive in most cases"); Lafontaine & Slade, *supra*, at 408 (reviewing several studies and concluding, "voluntarily adopted restraints are associated with lower costs, greater consumption, higher stock returns, and better chances of firm survival"); Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 680 (2007) ("[U]nder most circumstances, profit-maximizing vertical-integration decisions are efficient, not just from the firms' but also from the consumers' points of view. . . . we have found clear evidence that restrictions on vertical integration . . . are usually detrimental to consumers."); Cooper, *et al.*, *supra*, at 648-58 ("Most studies find evidence that vertical restraints/vertical integration are pro-competitive[.]"); *see also* Letter from FTC Staff to Marlene H. Dortch, Secretary, FCC

at 28 (July 17, 2017), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-bureau-consumer-protection-bureau-competition-bureau-economics-federal-trade/ftc_staff_comment_to_fcc_wc_docket_no17-108_7-17-17.pdf ("Most forms of vertical integration can generate procompetitive efficiencies, thus antitrust analysis generally regards them as harmless or even beneficial to consumer welfare.").

Accordingly, economic theory and empirical evidence clearly demonstrate that substantial market power is a necessary prerequisite to a firm's (rare) ability to use vertical restraints to harm competition.

C. Established Case Law on Vertical Restraints Supports the Use of Market Power as a Screen in Antitrust Analysis

Courts have likewise recognized that vertical restraints tend to offer numerous consumer benefits and, accordingly, require a demonstration of market power sufficient to restrict market-wide output before finding vertical restraints unlawful. *See Leegin*, 551 U.S. at 889-92; *Sylvania*, 433 U.S. at 54-57. Courts have, for instance, established a market power prerequisite for tying cases. *Jefferson Parish*, 466 U.S. at 13-15 ("[W]e have condemned tying arrangements when the seller has some special ability—usually called 'market power'—to force a

purchaser to do something that he would not do in a competitive market." (citing, *inter alia*, *United States Steel Corp. v. Fortner Enters, Inc.*, 429 U.S. 610, 620 (1977))).[10] The *Leegin* Court similarly explained the necessity and utility of the market power requirement in vertical restraint cases:

> [T]hat a dominant manufacturer or retailer can abuse resale price maintenance for anticompetitive purposes may not be a serious concern unless the relevant entity has market power. If a retailer lacks market power, manufacturers likely can sell their goods through rival retailers. And if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets.

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[10] *See also PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 815 n.2 (6th Cir. 1997); *Digital Equip. Corp. v. Uniq Digital Techs., Inc.*, 73 F.3d 756, 761-63 (7th Cir. 1996) ("[S]ubstantial market power is an indispensable ingredient of every claim under the Rule of Reason."); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988) (Breyer, J.) ("The plaintiffs here cannot meet the significant 'market power' requirement of *Jefferson Parish*.").

551 U.S. at 898 (citation omitted). That is, the market power requirement provides a critical screen, offering a clear criterion that must be satisfied for anticompetitive harm to arise. This screen helps antitrust courts to properly balance Type I and II errors in vertical restraint cases.

Substantial market power is defined as the ability to restrict market-wide output, and thereby to increase market-wide prices, within an antitrust-relevant market. *Jefferson Parish*, 466 U.S. at 27, n.46 ("As an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market."); *Rebel Oil*, 51 F.3d at 1434 ("A predator has sufficient market power when, by restricting its own output, it can restrict marketwide output and, hence, increase marketwide prices."); *Ball Mem'l Hosp.*, 784 F.2d at 1335 ("Market power comes from the ability to cut back on the market's total output and so raise price[.]"); Muris, *The FTC and the Law of Monopolization*, *supra*, at 696 ("In both law and economics, such power is defined as the ability to raise price and restrict output in an industry."). In turn, assessing the existence of a firm's market power requires a working understanding of the relevant market. As developed above, properly understanding the effects of conduct in two-sided markets demands an assessment of how both sides of the market react to given stimuli. No principled or

economic basis exists for accepting the artificial distinction Petitioners identify between the merchant and the cardholder side.

Here, cutting cardholders out of the relevant market artificially shrinks the market—and, in doing so, omits any consideration of the significant competition occurring for cardholders that inherently implicates merchant-side competition. Credit card companies, in fact, compete aggressively for cardholders today. There is no serious argument or evidence that competition for cardholders has decreased. To the contrary, cardholders have more access and options than ever, and benefits have improved meaningfully. *See* App'x at 52a.

Focusing solely upon the merchant side is particularly misleading regarding market power here. It is expected that a platform balancing the competing demands of its two customer groups would experiment by shifting increasing costs to the less demand-sensitive side of the market. Klein, *et al.*, *supra*, at 585-99. Given output (in the form of transaction volume) was increasing here, it is also expected that prices might also rise. App'x at 52a; *Brooke Grp.*, 509 U.S. at 237. That credit card companies would increase prices to merchants—as the side more willing to bear the increased cost burden—at this time is, accordingly, fully anticipated

and consistent with healthy competition. Klein, *et al.*, *supra*, at 585-99.

Moreover, as Klein, *et al.* have explained, "the economic theory of pricing in two-sided markets indicates that [merchant acceptance fees] are not a measure of payment card system market power." *Supra*, at 594. Market power refers to an ability to affect the total price of the payment system market-wide, i.e., for both cardholders and merchants. But "the role of interchange fees is to influence *relative* merchant and cardholders prices and not the total price collected by the payment system." *Id.*; *see also* Rochet & Tirole, *supra*, at 646; Evans & Noel, *supra*, at 669 ("[A] recent effort in Australia to place a cap on the fees charged by credit card systems to merchants has resulted in an increase in annual fees (paid by consumers) for credit cards."); Julian Morris, et al., PUNISHING REWARDS: HOW CLAMPING DOWN ON CREDIT CARD INTERCHANGE FEES CAN HURT THE MIDDLE CLASS 19-24 (2017) ("[T]he evidence suggests that capping interchange fees . . . has had a net negative effect on consumers[.]"). Accordingly, the district court's reliance upon Amex's pricing to merchants to ascertain market power was largely misplaced. *See* App'x at 165a-166a; App'x at 43a-44a.

Consider further that Amex's offering better benefits to its valuable, spend-heavy card holders encourages them to use their card more often—which

the record makes clear they do. Despite being available at 3 million fewer merchant locations than Discover, Amex accounts for significantly more transaction volume than Discover. App'x at 13a, 85a. This increased consumer use of Amex cards benefits merchants that accept Amex—and, accordingly, encourages them to free ride off Amex's brand.

Accordingly, the Second Circuit correctly held market power is a necessary prerequisite to finding a vertical restraint violates Section 1 and, further, the Government failed to demonstrate Amex commanded the requisite market power.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court affirm the Second Circuit's decision.

Respectfully Submitted,

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APPENDIX A[11]

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